No. 92-1168

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERESA HARRIS,
Petitioner

v.

FORKLIFT SYSTEMS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF NATIONAL CONFERENCE OF WOMENS' BAR ASSOCIATIONS AND WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICI CURIAE

Amicus Curiae National Conference of Women's Bar Associations ("NCWBA") is a national non-profit professional organization of state, regional, and local women's bar associations in 47 states and the District of Columbia. Its goals are to promote the advancement of women in the profession of law, to enhance the professional lives of women lawyers, and to advance issues of interest to women and the profession. NCWBA is an affiliate of the American Bar Association ("ABA"), and works closely with the ABA's Commission on the Status of Women in the Profession to further these goals.

Amicus Curiae Women's Bar Association of the District of Columbia ("DCWBA) is a membership organization of nearly 2000 judges, lawyers and law students in private and government practice throughout the District of Columbia metropolitan area. Founded in 1917, it is one of the oldest,

largest, most active women's bar associations in the country. DCWBA is a constituent member of NCWBA.

Numerous studies conducted by these organizations over the last decade show that sexual harassment persists as a major barrier to women in the legal profession. These studies, which we wish to present to the Court, demonstrate that unwelcome and offensive sex-based conduct in the workplace causes substantial damage to women lawyers' self-respect, credibility, professional reputation, and ability to realize their professional potential even when it does not result in serious psychological injury. The court below was wrong to deprive the victims of such conduct of the protections of Title VII.

STATEMENT OF THE CASE

This case is on writ of certiorari from the Sixth Circuit. The petitioner, Teresa Harris, was employed as respondent's rental manager from April 1985 until October 1987. The respondent, Forklift Systems, Inc., is a Tennes-

see corporation that sells, leases and repairs forklift machines. Petitioner was the only female of six managers other than the daughter of Forklift's president, Charles Hardy.

Hardy engaged in a course of sexually abusive and demeaning conduct toward petitioner during her employment. He said to her on a number of occasions in the presence of other employees: "you're a woman, what do you know" and "we need a man as the rental manager." He also publicly referred to her as "a dumb ass woman." He directed her to bring coffee into a manager's meeting at least once, a request not made to male managers. He asked Harris and other female employees, but not male employees, to retrieve coins from his front pants pocket. He also threw objects on the ground in front of Harris and other female employees, but not male employees, and asked them to pick up the objects. He made sexual comments about the clothing worn by Harris and other female employees, but not by male employees.

In August, 1987, after Harris had begun experiencing anxiety and emotional upset, she met with Hardy, complained about his behavior, and asked him to stop. Hardy stated that he had been only "joking," apologized and promised to change. Nevertheless, he soon began the same behavior again and, in mid September 1987, in front of other employees, stated that Harris had promised sexual favors to secure an account from a client. Harris then left her job.

On July 7, 1989, Harris filed a complaint for damages and injunctive relief under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, in the United States District Court for the Middle District of Tennessee, alleging that she had been constructively discharged because of the sexually hostile work environment created by Charles Hardy. At trial, Hardy never denied any of his actions, defending them as merely "jokes." The United States Magistrate who tried the case found that Hardy's behavior was crude and vulgar and would have offended a reasonable female manager. Never-

theless, he issued a report and recommendation for dismissal of Harris's claim because he found that she had not suffered serious psychological injury. After the District Court adopted the report and recommendation of the magistrate and dismissed the case, petitioner appealed to the Sixth Circuit, which affirmed without opinion. *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992).

SUMMARY OF ARGUMENT

It might be expected that women in the professional legal workplace are unlikely to face the sexually abusive and demeaning treatment meted out to the petitioner here, including publicly describing her as "a dumb ass woman." Unfortunately, that is not so. Sexual harassment persists as a major barrier to equal employment opportunity for women lawyers. The great majority of women lawyers have experienced or observed such conduct.

NCWBA member organizations, including DCWBA, have been active participants, over the last decade, in numerous gender bias studies documenting the deleterious effects to women lawyers of such treatment in the courts and other legal workplaces. These studies show that the sexually harassing conduct suffered by the petitioner here -- the "discriminatory intimidation, ridicule and insult" described by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57,

66 (1986) -- , although it falls short of causing serious psychological injury, nevertheless seriously interferes with women lawyers' self respect and ability to practice their profession in peace. These studies demonstrate the error of the court below in limiting Title VII's ban against "hostile environment" sexual harassment to conduct that causes serious psychological injury.

The restrictive interpretation of the court below finds no support in this Court's decision in *Meritor Savings Bank* or in the EEOC Guidelines on sexual harassment, 29 C.F.R. §1604.11(a). It stigmatizes women who seek a remedy under Title VII even if they win by marking them as psychologically impaired. It confuses common-law tort damage remedies with statutory employment discrimination protections. It should be enough, for a plaintiff to prevail in a "hostile environment" sexual harassment case, to prove that the complained of sexual conduct, as defined in the EEOC Guidelines, was sufficiently severe or pervasive to alter the

conditions of her employment or to create an abusive working environment, and that the conduct was unwelcome.

ARGUMENT

SEXUALLY ABUSIVE AND DEMEANING WORKPLACE CONDUCT IS A MAJOR BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY AND THEREFORE ACTIONABLE UNDER TITLE VII EVEN WHEN IT DOES NOT SUCCEED IN CAUSING SERIOUS PSYCHOLOGICAL INJURY COMPENSABLE UNDER COMMON LAW TORT REMEDIES

The requirement imposed by the court below to show serious psychological injury to the victim as an essential element of "hostile environment" sexual harassment finds no support in the Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 66 (1986) or the EEOC Guidelines on sexual harassment, 29 C.F.R. §1604.11(a). Further, it confuses common-law tort damage remedies with statutory employment discrimination protections. Finally, it stigmatizes the victim rather than the harasser by focusing on her susceptibility to psychological injury rather than his unacceptable workplace behavior.

The focus in hostile environment cases ought to be on preventing arbitrary interference with a victim's ability to do her job, not on her ability to withstand psychological punishment. As the Ninth Circuit has observed, "[a]lthough an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

It might be expected that women in the professional legal workplace are unlikely to face the treatment meted out to the petitioner in this case. Unfortunately, that is not so. *Amici curiae* have been active participants, over the last decade, in numerous studies documenting the pervasive problems to women lawyers of sexually abusive and demeaning treatment in the courts and other legal workplaces. These studies demonstrate that the sexually harassing conduct suf-

fered by the petitioner here -- the "discriminatory intimidation, ridicule and insult" described by this Court in *Meritor Savings Bank*, 477 U.S. at 66 -- seriously interferes with the work performance of women lawyers even when it does not succeed in seriously affecting their psychological well being. *See Ellison v. Brady*, 924 F.2d at 878 n.8.

Women lawyers continue to face a "glass ceiling" in the legal profession, as evidenced by their small numbers in its upper echelons of law firm partners and federal judges.[1] Sexual harassment persists as a major barrier to equal em-

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[1] Women are 43% of all law students. They are 25% of the 350,000 member American Bar Association (ABA), the largest professional association of lawyers and judges in the United States. Nevertheless, only 18% of women in private practice are partners in law firms compared with 45% of men. Only 12% of federal judges are women. Telephone interview with ABA Membership & Marketing Division, Chicago, Illinois (March 31, 1993); *The State of the Legal Profession, 1990*, ABA Young Lawyers' Division 63 (1990); the National Association of Women Judges, letter to the membership, 9/29/92.

ployment opportunity for women lawyers.[2] The great majority of all women lawyers have experienced or observed sexually abusive and demeaning conduct in the legal workplace, including unwanted sexual teasing, jokes, remarks or questions, pressure for dates, sexual looks or gestures, deliberate touching, leaning over, or cornering, and other offensive conduct.[3] In 1992, the American Bar Association,

the nation's largest professional association of judges and lawyers, approved a resolution recognizing that sexual harassment is a serious problem in all workplace settings, including the legal profession, and committing the ABA to educate the profession to provide leadership in its eradication.[4]

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[2] *1988 Status Report on Women in the Legal Profession* at 8, ABA Commission on Women in the Profession Report to the ABA House of Delegates (1988) (hereafter "*1988 ABA Commission on Women Status Report.*") A major goal of the ABA is to promote the full and equal participation of women in the legal profession. ABA Goal IX, *Mission and Goals of the American Bar Association*, ABA Members' Guide, (4th Ed. 1992). In 1987, the ABA created the Commission on Women in the Profession to advance this goal. The Commission is composed of lawyers and judges from around the country and has conducted extensive public hearings and other investigations to assess the status of women in the profession. Its first chair was Hillary Rodham Clinton, a highly regarded lawyer and now First Lady.

[3] *The State of the Legal Profession, 1990* at 67-8. In 1984, because of apparent widespread career dissatisfaction among lawyers, the ABA Young Lawyers' Division undertook an in-depth national survey of the legal profession "in order to accurately study the state of the profession and determine the extent of career dissatisfaction, who is dissatisfied, and why they are dissatisfied." *Id.* at 1. The study consisted of a random probability sample of 3000 lawyers of all ages drawn from both ABA member and non-member lists totalling 569,706 lawyers, roughly 90% of the estimated universe of lawyers at the time. In 1990, the Young Lawyer's Division conducted a study to update the results and obtain statistically accurate data on emerging issues such as the persistence of gender bias as a cause of dissatisfaction among women lawyers. *Id.* at 2. *See also* E. Couric, *Women in the Large Firms: A High Price of Admission?*, National Law Journal, Monday, December 11, 1989 at S2. In a survey of 3000 women in the nation's largest law firms conducted by the National Law Journal/West Publishing Company, 60% of the women responding said they had experienced unwanted sexual attention.

[4] *Report to the ABA House of Delegates on Sexual Harassment*, ABA Commission on Women in the Profession (1992); Resolution approved by ABA House of Delegates February 3, 1992.

The constituent members of NCWBA, including DC-WBA, have participated actively during the last decade in gender bias task forces established by State Chief Justices, Bar Associations, and Judicial Conferences all over the country. These task forces have used a wide variety of methods to collect information on the nature and extent of gender discrimination in the legal workplace, including holding public hearings, receiving sworn testimony and affidavits, reviewing public documents, and conducting written surveys of lawyers and judges.[5] As of September,

[5] For example, to obtain information about the demographic characteristics, experiences, and attitudes of the Ninth Circuit Federal Bar, the Ninth Circuit gender bias task force relied on a survey sent to a probability sample of active federal court practitioners in every district of the Ninth Circuit, including attorneys in private civil and criminal defense practice, corporate counsel, government staff attorneys, deputy federal public defenders, and assistant U.S. attorneys. A total of 3531 attorneys, about 50% of those sampled, responded to the survey. The 95% confidence interval for the sample is +/- 2%. This research is one of the largest scientifically designed surveys of attorneys ever conducted nationwide. *Preliminary Report of the Ninth Circuit Gender Bias Task Force*, United States Courts, Ninth Judicial Circuit 4-5 (1992).

1992, such task forces were at some stage of formation, report preparation, or implementation, in thirty-eight states, three federal circuits, Puerto Rico and the District of Columbia. Reports had been issued for twenty-four state court systems, the local court system in the District of Columbia, and the United States Court of Appeals for the Ninth Circuit.[6]

The survey results reported show that sexually offensive conduct toward women attorneys, particularly the younger ones, is pervasive. Women lawyers are often addressed by terms of endearment such as "honey" and "sweetheart" rather than professional titles. Male judges and opposing at-

[6] L. H. Schafran, *Annual Report on the Activities of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), October 1991 through September 1992* (1992. The lists of task forces according to their conveners and their current phase of activity are set forth in the attached Appendix to the Brief. These reports are too voluminous to attach. *Amici curiae* will be glad to furnish copies of any requested.

torneys routinely make comments about women's gender,[7]

[7] A woman attorney testified at a public hearing of the Louisiana task force on women in the courts that, at a pre-trial conference, she was the only woman among six lawyers and the judge. When her turn came to explain her version of the case, she was halfway through her theory when the judge interrupted and said: "Oh, come on now; shut up. Let's hear what the men have to say." *Final Report, Louisiana Task Force on Women in the Courts* 116 (1992).

physical appearance and clothing[8], sexual attractiveness[9] and sexual availability.[10]

Such conduct interferes with women attorneys' ability to make a living, because it undermines them before those

[8] In a case where a female attorney was representing proposed adoptive parents, the judge looked her up and down and said: "they don't make the stork like they used to!" Another male judge said to a pregnant attorney,"So I see you got knocked up." *Gender Bias in the Courts* 122, Maryland Special Joint Committee (1989) (hereafter "*Maryland Report*"). A male court referee said to a woman attorney who had just given birth to a child, in front of clients and opposing counsel, "My, your breasts have gotten big from nursing, haven't they!" *Final Report, Minnesota Supreme Court Task Force for Gender Fairness in the Courts* 92 (1989) (hereafter "*Minnesota Report*").

[9] The Minnesota study reports that a male judge interrupted a female prosecutor's opening statement to call her to the bench to tell her he liked the way she was wearing her hair that day. *Minnesota Report* at 91.

[10] During a chambers conference with one male and three female attorneys, the male judge asked: "How's the rooster making out with all these hens?" *Maryland Report* at 122.

they most need to impress -- judges, juries, supervisory attorneys and clients.[11]

Women attorneys who object to such conduct are considered to be radical feminists or women's libbers,[12] while those who do not object because, for example, they

[11] Of the judges who responded to the judges' surveys conducted by the Massachusetts Gender Bias Study Committee's survey, one-third reported having observed instances in which gender affected the relationship between opposing counsel, including belittling remarks made to female attorneys, improper address by first name or terms of endearment, and not allowing female attorneys to speak. Sixty percent of those judges believed that such conduct was detrimental to the presentation of the case at hand, because it drew attention away from the issues, placed counsel in unequal standing, interfered with female counsel's presentation, delayed the trial, or demeaned the professional atmosphere of the court. *Gender Bias Study of the Court System in Massachusetts* 145-146, 151, Supreme Judicial Court of Massachusetts (1989).

[12] *1988 ABA Commission on Women Status Report* at 10. A female associate of an Indiana law firm described unwanted forced fondling by a senior associate and other incidents involving a partner. When she reported them to two of the highest ranking partners in the firm (all male), she was told that she was a problem to the firm because she could not get along with people and that no matter what anyone did to her she was to keep her mouth shut. *Report of the Commission on Women in the Profession* at 31, Indiana State Bar Association (1991).

fear prejudice to their clients' case,[13] are seen as weak and vulnerable. There should be no doubt that, when sufficiently pervasive, such conduct seriously interferes with women attorneys' self-respect, authority, credibility and reputation in the community, and consequently, with their freedom to perform to their highest potential.[14]

[13] Responses to the survey conducted by the Maryland State Bar Association included the comment that a woman attorney had been treated like a child and called "little girl" in front of her clients by certain judges, that she resented this treatment, but was unable to object because she was "in a position where I can't do anything without adversely affecting my client's case." *Maryland Report* at 119. In the Minnesota survey, concerns about possible negative consequences for the attorney or her client were particularly influential in the decision not to object to unwanted sexual commentary. *Minnesota Report* at 95.

[14] In *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), the United States District Court for the District of Columbia held the U.S. Securities and Exchange Commission liable under Title VII for hostile environment sexual harassment against a female SEC attorney. The court found that the environment, in which, *inter alia*, senior male SEC attorneys made sexually crude remarks to the plaintiff and others, touched them without their consent, and bestowed preferential treatment on those who submitted to their sexual advances, poisoned any possibility of the plaintiff "having the proper professional re-

The requirement of serious psychological damage imposed by the court below confuses common-law tort damage remedies with statutory employment discrimination protections against arbitrary barriers to equal employment opportunity. Obviously, not all sexual harassment causes serious psychological injury. In cases where severe psychological injury does result, plaintiffs already commonly join pendent claims for state tort causes of action, including intentional infliction of emotional distress, to their Title VII claims. *See* B. Schlei & P. Grossman, *Employment Discrimination* 428-429 (2d Ed. 1983). An essential element of proof in these claims is the infliction of severe psychological injury. *Restatement (Second) of Torts* §46 (1965), *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529-531 (D.D.C.

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spect for her superiors and, without any question, affected her motivation and her performance of her job responsibilities." *Id.* at 1273. It rejected defense attempts to redirect the case to plaintiff's state of mind by characterizing her as "paranoid," focusing rather on her sexually demeaning conditions of employment.

1981). Thus, the interpretation of Title VII's ban on sexual harassment imposed by the court below simply duplicates existing common law tort remedies. Worse, it fails to protect employees from sexually abusive and demeaning workplace conduct which falls short of causing severe psychological injury, no matter how much such conduct interferes with work performance.

The requirement to prove serious psychological injury from sexual harassment will deprive women of the protection of Title VII by deterring complaints in all except the most egregious situations. Women lawyers are already afraid to complain because, if they do, they are considered unfit to be lawyers because "they can't take it." Under this standard, they will be deprived of a legal remedy for job interference until sexual harassment becomes so severe and psychologically damaging that they may in fact be unfit to perform as lawyers. Then, even if they win their Title VII cases, they will be stigmatized by being identified as psychologically

impaired. As a result, women will never realize their full potential as equal members of the legal profession because they will have to accept, as the price of their profession, sexually demeaning treatment such as the "dumb ass woman" description condoned by the courts below.

It should be enough, for a plaintiff to prevail in a "hostile environment" sexual harassment case, to prove that the complained of sexual conduct, as defined in the EEOC Guidelines, was sufficiently severe or pervasive to alter the conditions of her employment or to create an abusive working environment, and that the conduct was unwelcome. *Meritor Savings Bank*, 477 U.S. at 67-68; *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 563-564 (9th Cir. 1992); *Ellison v. Brady*, 924 F.2d at 876; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

GENDER BIAS TASK FORCES IN THE COURTS ACCORDING TO STAGE OF ACTIVITY AND BY WHOM AND WHEN ESTABLISHED.

Source: L.H. Schafran, *Annual Report on the Activities of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), October 1991 through September 1992*, Appendix, Task Forces on Gender Bias in the Courts as of September 1992 (1992).

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1. Task Force Reports Issued and by whom and when task force established

Preliminary Report of the Ninth Circuit Gender Bias Task Force, United States Courts, Ninth Judicial Circuit (1992) (Ninth Circuit Judicial Conference 1990);
Achieving Equal Justice for Women and Men in the Courts, Draft Report of the California Judicial Council Advisory Committee on Gender Bias in the Courts (1990) (the Chief Justice, 1987);
Gender & Justice in the Colorado Courts, Colorado Supreme Court Task Force on Gender Bias in the Courts (1990) (the Chief Justice, 1988);
Gender, Justice and the Courts, Report of the Connecticut Task Force (1991) (the Chief Justice, 1987);
Final Report of the District of Columbia Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts (1992) (District of Columbia Courts Joint Committee on Judicial Administration, 1990;
Report of the Florida Gender Supreme Court Bias Study Commission (1990) (the Chief Justice, 1987);

Gender and Justice in the Courts, a Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System (1991) (the Chief Justice, 1989);
Achieving Gender Fairness; Designing a Plan to Address Gender Bias in Hawaii's Legal System, Report of the Ad Hoc Committee on Gender Bias (1989) (the Chief Justice, 1987);
Report of the Idaho Judicial Fairness and Equality Committee of the Supreme Court (1990) (the Chief Justice, 1990);
The 1990 Report of the Illinois Task Force on Gender Bias in the Courts (1990) (three bar associations at the direction of the Supreme Court, 1988);
Report of the Commission on Women in the Profession, Indiana State Bar Association (1991);
Equal Justice for Women and Men, Kentucky Task Force on Gender Fairness and the Courts(1992) (the Chief Justice and the Kentucky Bar Association, 1989);
Final Report, Louisiana Task Force on Women in the Courts (1992) (the Chief Justice, 1989;
Gender Bias in the Courts, Maryland Special Joint Committee (1989) (the Chief Judge, 1987);
Gender Bias Study of the Court System in Massachusetts, Supreme Judicial Court (1989) (the Chief Judge, 1986);
Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts (1989) (the Chief Justice, 1987);
Final Report, Minnesota Supreme Court Task Force for Gender Fairness in the Courts (1989) (the Chief Justice, 1987);
Justice for Women, Nevada Supreme Court Gender Bias Task Force (1989) (the Chief Justice, 1986);
First Year Report (1984), *Second Year Report* (1986), the New Jersey Supreme Court Task Force on Women in the Courts (the Chief Justice, 1982);
Final Report of the New Mexico State Bar Task Force on Women and the Legal Profession (Mexico, 1990) (New Mexico Bar Association, 1989);

Report of the New York Task Force on Women in the Courts (1986) (the Chief Judge, 1984);
Final Report of the Rhode Island Committee on Women in the Courts (1987) (the Chief Justice, 1984);
Report to the Utah Judicial Council, Utah Task Force on Gender and Justice (1990) (the Chief Justice, 1986);
Gender and Justice, Report of the Vermont Task Force on Gender Bias in the Legal System (1991) (the Chief Justice and the Vermont Bar Association, 1988);
Final Report of the Washington State Task Force on Gender and Justice in the Courts (1989) (the Chief Justice, 1987);
Final Report, Wisconsin Equal Justice Task Force (1991), (the Chief Justice, 1989).

2. <u>Task Force Reports in preparation and by whom and when task force established</u>

Pima County, Arizona, Task Force for the Study of Gender and Justice (established in 1983 by a Judge, endorsed by the Supreme Court, now sponsored by a Bar Association);
Arkansas Bar Association Commission on Women and Minorities (Arkansas Bar Association, 1989);
Association of the Bar of the City of New York Subcommittee Regarding Gender Bias in the Federal Courts (Southern and Eastern Districts of New York) (City Bar, 1991);
District of Columbia Circuit Court of Appeals Task Force on Racial, Ethnic and Gender Bias (Judicial Council of D.C. Circuit, 1990);
Iowa Equality in the Courts Task Force (the Chief Justice, 1990);
Kansas Task Force on the Status of Women in the Profession and in the Courts (Kansas Bar Association, 1989);
Missouri Gender and Justice Task Force (the Chief Justice, 1990);
Montana Gender Bias Task Force (the Chief Justice, 1990);

Nebraska Task Force on Gender Fairness (the Chief Justice, 1991);
Ohio Task Force on Gender Bias in the Courts (Supreme Court and Ohio Bar Association, 1991);
Puerto Rico Judicial Commission to Study Gender Bias in the Courts (the Chief Justice, 1992);
Texas Task Force on Gender Bias in the Courts (Supreme Court, 1991).

3. Task Forces in process, and by whom and when established

Alaska Ad Hoc Working Group on Gender Bias, 1992;
Delaware Committee to Explore Gender Bias Study (the Chief Justice, 1992);
Maine Exploratory Committee on Gender Bias (the Chief Justice, 1989);
North Dakota Judicial System Gender Fairness Assessment Sub-Committee of the North Dakota Judicial Planning Committee (Supreme Court, 1987);
Pennsylvania Task Force on Gender and Justice (Pennsylvania and Philadelphia Bar Associations, 1991).